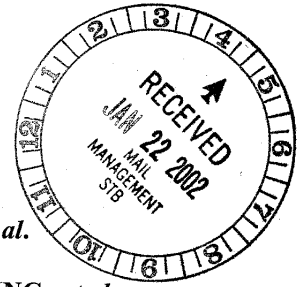


BEFORE THE
SURFACE TRANSPORTATION BOARD



204549

SECTION 5a APPLICATION NO. 118 (Sub No. 2), *et al.*

EC-MAC MOTOR CARRIERS SERVICE ASSOCIATION, INC., *et al.*

REPLY OF
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
TO THE RATE BUREAUS'
PETITIONS FOR RECONSIDERATION

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S5M	116	1	204560

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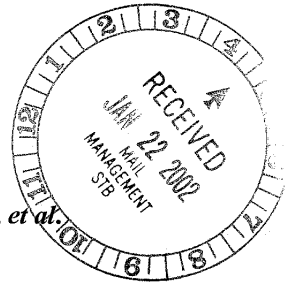
Attorneys for
The National Industrial Transportation League

January 22, 2002

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

SECTION 5a APPLICATION NO. 118 (Sub No. 2), *et al.*

EC-MAC MOTOR CARRIERS SERVICE ASSOCIATION, INC., *et al.*



**REPLY OF
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
TO THE RATE BUREAUS'
PETITIONS FOR RECONSIDERATION**

The National Industrial Transportation League ("League") hereby replies to the Petitions for Reconsideration filed by various motor carrier rate bureaus in connection with the Surface Transportation Board's ("STB" or "Board") November 20, 2001 decision ("2001 Decision") issued in this proceeding.

The majority of the rate bureaus claim that the Board's 2001 Decision, which conditions approval of their agreements by (1) requiring "truth-in-rates" notice when a rate bureau member offers a rate that references a collectively-established rate and (2) prohibiting application of loss-of-discount provisions that reinstate a collectively-set rate as a penalty for late payment, was based upon material error. The rate bureaus have asked the Board to eliminate or substantially revise the conditions set forth in the 2001 Decision.

The League submits that the Board's decision is lawful and that its rulings should be upheld. The conditions adopted by the Board represent a valid exercise of the Board's authority over collective ratemaking, including its broad conditioning power over rate bureau agreements which must be exercised to protect the public interest. The 2001 Decision is procedurally

sound and adopts conditions that are a logical outgrowth of the prior decisions issued by the Board in the rate bureau proceedings. The decision is supported by the record which clearly establishes the need for adoption of the truth-in-rates and loss of discount conditions. Furthermore, the decision strikes an appropriate balance by providing protections to shippers that will assist in reducing the application of noncompetitive class rates while simultaneously avoiding unnecessary interference with rate negotiations in the motor carrier industry. Thus, the rate bureaus' Petitions for Reconsideration must be denied.

The League also supports the Petition for Reconsideration filed by the National Small Shipments Traffic Conference ("NASSTRAC"), which asks the Board to supplement the conditions imposed in the 2001 Decision by requiring the rate bureaus to maintain the existing minimum discounts published in their agreements.

I. THE BOARD'S DECISIONS

The matter of whether motor carrier rate bureaus whose members collectively establish "class" rates under the shield of antitrust immunity should continue to be approved and, if so, upon what conditions, has been the subject of extensive debate and commentary before the Board for more than four years. In May 1997, pursuant to a Notice published in the Federal Register, the Board initiated a proceeding, as it was then directed to do under the ICC Termination Act of 1995,¹ and requested comments from interested parties on such matters. A key question involved in that proceeding was whether motor carrier rate bureaus, which played a more prominent role decades ago when the motor carrier industry was highly regulated, serve a

¹ Pub. L. No. 104-88, 109 Stat. 803.

legitimate public interest in modern times, where the motor carrier industry operates in a highly competitive environment.²

In that predecessor proceeding, the Board reconfirmed that rate bureau class rates are set well above market-based levels and that it is common practice for members of the rate bureaus to offer discounts from the noncompetitive class rates when pricing their trucking services. For large and more experienced customers of rate bureau members, discounts can be 70% or higher. However, the Board also found that some shippers are less informed about the pricing practices of rate bureau members and, in particular, about the availability of discounting and thus wind up paying the noncompetitive benchmark rates. Dec. 10, 1998 Decision at 7 (“1998 Decision”). The Board expressed concern that “it is undisputed that some shippers pay undiscounted or minimally discounted class rates, and we do not believe that their situation can be ignored.” *Id.* The Board, therefore, decided that collective ratemaking “produces unrealistically high ‘benchmark’ rates” (1998 Decision at 5) and that “on the basis of the record compiled in this proceeding, we find that collective ratemaking, under present circumstances, contravenes the public interest. . . .” 1998 Decision at 8.

The Board, thus, soundly decided that approval of the rate bureau agreements must be conditioned so that less experienced and uninformed shippers would not be misled into believing that rate bureau class rates represent a reasonable or market based price for the transportation services to be performed. The Board proposed to achieve that objective by requiring the roll-back of collectively established base-line rates to market levels. 1998 Decision at 8.

² Indeed, the need for and purpose served by government sanctioned collective ratemaking activities by motor carriers have been seriously questioned following substantial deregulation of the industry resulting from the Motor Carrier Act of 1980 (Pub. L. No. 96-296, 94 Stat. 793), the Trucking Industry Regulatory Reform Act of 1994 (Pub. L. No. 103-311, 108 Stat. 1683), and ICCTA. As legislative reforms to the motor carrier industry were implemented over the past decades, the industry has been transformed from one that was subject to substantial regulation and barriers to entry to one where pricing is established under robust competition.

This proceeding followed, in which the Board called for interested parties to propose methodologies for reducing the collectively established rate bureau rates to market levels.³ The Board, however, did not receive specific methodologies from the participating parties and, based upon the comments received, determined that requiring a roll-back of bureau class rates to market levels may be too disruptive, since thousands of existing shipping arrangements based upon the current discounting system may be impacted by such a requirement. 2001 Decision at 5-6. The Board instead logically concluded from the record that its goal of preventing the application of noncompetitive class rates could be achieved by ensuring that shippers are informed of the practice of widespread discounting off the class rates. The Board thus appropriately adopted the “truth-in-rates” policy in the 2001 Decision.

Under this policy, rate bureau members must “provide a truth-in-rates notice each and every time they list rates or otherwise give a rate quote (whether verbally, electronically, or in writing) that references a collectively set rate.” 2001 Decision at 9. The notice must inform shippers that the rate has been established collectively under immunity from the antitrust laws, and that a range of discounts are offered by rate bureau members. *Id.* The Board also rationally adopted a condition which prohibits a rate bureau member from applying a loss of discount provision that would require payment of the unreasonably high class rate based upon late payment by the shipper. 2001 Decision at 10.

³ Prior to instituting this proceeding to discern methodologies for reducing the bureau rates, Congress passed the Motor Carrier Safety Improvement Act of 1999 (“Safety Act”) which modified the provisions in ICCTA regarding the periodic review of rate bureau agreements. See 49 U.S.C. § 13703(c), now providing for a 5-year periodic review process. Significantly, the Safety Act did not overturn the Board’s 1998 Decision which conditioned approval of the rate bureaus by requiring a reduction in class rates to market based levels. See 49 U.S.C. § 13703(e)(2). Thereafter, on February 11 2000, the Board denied the Petitions for Reconsideration of the December 1998 Decision filed by the rate bureaus.

II. THE DECISION TO CONDITION ANTITRUST IMMUNITY ON TRUTH-IN-RATES DISCLOSURES DOES NOT VIOLATE THE APA

Notably, the rate bureaus do not challenge the substantive authority of the Board to condition approval of their agreements by imposing the truth-in-rates requirement. They do not make such a claim because ICCTA provides the Board with broad authority to act in the public interest to establish conditions the rate bureaus must satisfy in order to set collective rates under the shelter of antitrust immunity. See 49 U.S.C. 13703. The rate bureaus instead raise a procedural claim, namely, that the Board failed to provide adequate notice and opportunity to comment on the truth-in-rates condition. This claim has no merit.

The truth-in-rates ruling was a logical outgrowth of a lengthy administrative process to develop conditions designed to protect shippers from unwittingly paying inflated collective rates that exceed prevailing market rates. The proceedings leading up to the truth-in-rates requirement demonstrate that the rate bureaus have already received a full and fair opportunity to comment on the pertinent issues, and that soliciting additional comments would not add useful information to the record.

The truth-in-rates requirement is a rational outcome to the rate bureau proceedings based upon the conclusions adopted by the Board in its prior decisions. In the 1998 Decision, the Board found, *inter alia*,

- (i) that the existing system had evolved to set inflated collective rates from which individual carriers commonly provide discounts of 50% or more;
- (ii) that allowing the rate bureaus to set collective rates under an umbrella of antitrust immunity lends the government's imprimatur to inflated rates, leading uninformed shippers to believe that such "unrealistically high list price[s]" are government-sanctioned, reasonable rates; and
- (iii) that the only shippers who pay undiscounted or minimally discounted collective rates are those who are "uninformed" "vulnerable," and "least able to bring a [rate reasonableness] case to the Board."

See 1998 Decision at 4 – 5. In denying the rate bureaus' petitions for reconsideration of its 1998 Decision, the Board reiterated in its 2000 Decision that the rate bureaus, as currently administered, serve no public interest and provide "no basis for shielding from antitrust scrutiny the existing rate setting process." See 2000 Decision at 2.

The Board nonetheless gave the rate bureaus an opportunity to justify their continued antitrust immunity by adjusting their class rates to levels commensurate with market-based rates. The Board's clear objective was to protect the more vulnerable segments of the shipping public by reducing inflated collectively-set rates to levels that more experienced, better-informed shippers actually pay for transportation services in the marketplace.⁴

Instead of proposing adjustments to their rate-setting procedures, the rate bureaus insisted that adjustments were not needed because, *inter alia*, (i) any traffic that moves at undiscounted or minimally discounted collective rates is, *ipso facto*, moving at the appropriate "market rate" for the traffic; and (ii) the rate bureaus had already addressed the Board's concerns by providing general discounts "for the benefit of shippers that have not negotiated their own discounts from the class rates published by each Bureau or who otherwise do not benefit from any special rates." See EC-MAC Comments at 10 – 12 (April 11, 2000). These points, which the Board had previously considered and rejected in its 1998 Decision, were non-responsive to the requests for specific rate reduction methodologies in the 2000 Decision.

As noted above, rather than imposing an across-the-board reduction of collective rates, the Board wisely concluded in the 2001 Decision that the less drastic truth-in-rates requirement would accomplish the Board's objective to "provide a means by which all shippers can be

⁴ This statement of the Board's objective flows naturally from (i) its observation that informed, sophisticated shippers do not pay undiscounted collective rates, and (ii) its stated desire to prevent "uninformed," and "vulnerable" shippers from paying inflated class rates set pursuant to a government sanctioned process immunized from the antitrust laws. See 1998 Decision at 4-5.

informed of the variety of prices potentially available when they receive rate quotations that are based on collectively set class rates.” *See* 2001 Decision at 8. In selecting a less drastic measure to solve the problem identified in its earlier decisions, the Board acted well within the scope of its authority under the APA. In that regard, it is well-established that federal agencies may “adjust or abandon . . . proposals in light of public comments or internal agency reconsideration without having to start another round of rulemaking.” Ass’n of Oil Pipe Lines v. F.E.R.C., 83 F.3d 1424, 1432 (D.C. Cir. 1996) (*quoting* Kooritzky v. Reich, 17 F.3d 1509, 1513 (D.C. Cir. 1994)). Such flexibility avoids “the absurdity that . . . the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary.” Shell Oil v. E.P.A., 950 F.2d 741, 750-51 (D.C. Cir. 1991) (*quoting* International Harvester Co. v. Ruckelhaus, 478 F.2d 615, 632 n. 51 (D.C. Cir. 1973)).

The truth-in-rates requirement is clearly a logical outgrowth of the Board’s earlier decisions. The rate bureaus thus cannot legitimately claim to be surprised by the conditions adopted in the 2001 Decision, given the clear articulation of the Board’s objectives in its prior decisions. The principles articulated in Air Transport Ass’n of Am. v. F.A.A. therefore do not counsel in favor of an additional round of comments. *See* 169 F.3d 1, 7 (D.C. Cir. 1999) (noting that the logical outgrowth question typically turns on whether the agency’s final rule departs so from its proposed rule as to constitute more surprise than notice).

The decision against additional comments is further reinforced by the fact that the rate bureaus’ Petitions for Reconsideration simply resurrect their same old arguments that the status quo of collective ratemaking is consistent with the public interest. Those arguments, which the Board has already considered and rejected, would add no useful information to the record. In any event, from a practical standpoint, the rate bureaus have already provided the Board with

their comments on the truth-in-rates issue in their Petitions for Reconsideration. An additional round of notice and comments would simply lead to the duplicative resubmission of comments that are already before the Board. The APA does not compel such a useless ritual. The principles articulated in National Exchange Carrier Ass'n Inc. v. F.C.C. therefore counsel against additional comments. *See* 253 F.3d 1 (D.C. Cir. 2001) (holding that the logical outgrowth inquiry turns on whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade an agency to modify a rule).

Under the circumstances, the League submits that the Board should consider the issues presented on reconsideration and then render an administratively final decision. In the alternative, if the Board deems additional comments are necessary, it should solicit them on an expedited schedule. The interested parties have already formulated their comments on the pertinent issues and additional delays are not warranted.⁵

III. THE TRUTH-IN-RATES REQUIREMENT WILL HELP PROTECT LESS SOPHISTICATED SHIPPERS WHO MIGHT OTHERWISE LACK INFORMATION ABOUT DISCOUNTS AVAILABLE IN THE MARKETPLACE

The rate bureaus do not dispute the utility of the truth-in-rates requirement as a means of protecting vulnerable segments of the shipping public. Instead, they ignore the conclusions adopted by the Board in the 1998 and 2000 Decisions and revive their well-worn position that no problem exists that warrants agency action.

The rate bureaus' contention that the truth-in-rates requirement is a solution in search of a problem is directly contrary to the well-established record and the Board's decisions. As

⁵ In the interest of moving this proceeding forward, the League further urges the Board to reject the rate bureaus' suggestion to retain the status quo for another two years, until the end of the 5-year periodic review process for bureau agreements established under the Safety Act. Further delays in addressing the current problems with administration of their agreements would make a mockery of the Board and the other parties who have participated in these proceedings with good intentions over the past four years.

discussed in Sections I and II above, the Board's 1998 Decision concluded that the rate bureau agreements, as currently administered, are contrary to the public interest and need to be reformed to, *inter alia*, prevent uninformed shippers from being misled to believe that inflated collective rates are government-sanctioned reasonable rates. In reaching its conclusion, the Board specifically found that "it is not so clear that every shipper is in fact in a position to shop for a reasonable and competitive [discount] rate." *See* 1998 Decision at 6. The rate bureaus unsuccessfully petitioned the Board to reconsider its 1998 Decision. The Board denied those petitions and the rate bureaus did not seek judicial review. The rate bureaus therefore lack grounds to challenge the Board's prior determination that a problem exists with the current rate bureau system that requires corrective conditions.

The rate bureaus implicitly acknowledge the operative problem with the current system when they state that "[s]hippers *active in the market* understand fully that rates are negotiated and that significant discounts may be available for their freight." *See* EC-Mac Petition at 6 (emphasis added). From that statement, it follows that shippers who are not active in the market, or who only participate occasionally, may lack sufficient knowledge about the class rate system to make informed pricing decisions. It is precisely these shippers who stand to benefit from the truth-in-rates requirement.

The rate bureaus undermine their own position by repeating the stock proposition that the "the motor carrier industry is a textbook example of a competitive industry." *See* EC-MAC Petition at 6. The generally high level of competition reflects the reality that in many cases rates are set through negotiations between carriers and more sophisticated shippers who control large volumes of traffic. That reality has no bearing on the Board's objective of protecting less experienced shippers who lack sufficient negotiating leverage to avoid paying above-market

rates. The simple fact is the truth-in-rates requirement will promote the public interest by ensuring that shippers receive sufficient information to negotiate market-based rates for their traffic. As the Board stressed in its 2001 Decision, the objective of the requirement is to “guarantee that carriers are not able to use the rate bureau process to set above-market class rates and then foist those collectively set class rates onto shippers unaware of the substantial discounts potentially available to others.” *See* 2001 Decision at 9.

In sum, the League believes that the truth-in-rates requirement is well-suited to protect the public interest by notifying more vulnerable shippers that they can and should shop around for competitive rates. If anything, the modicum of protection offered by the truth-in-rates requirement does not go far enough to protect such shippers. The League agrees with NASSTRAC that the Board should couple its truth-in-rates condition with a requirement that the rate bureaus maintain their minimum discounts currently provided on a voluntary basis. The proposal of NASSTRAC would close the existing loophole in the Board’s 2001 Decision which would allow the rate bureaus to eliminate their default discounts and offer a discount range to shippers where the low end of the range is zero or only 1-2 percent. The rate bureaus have stressed repeatedly that their minimum discount programs offer shippers valuable protections. The rate bureaus should therefore have no objection to providing those same protections in conjunction with the truth-in-rates disclosures.⁶

⁶ Although the rate bureaus assert that the truth-in-rates notice is not needed because of their published default discounts, the Board has already properly decided that the minimum discounts standing alone are an insufficient remedy since they generally apply only when the particular traffic is not subject to any other discount (the minimum discounts published by Southern Motor Carriers Rate Conference Inc. are an exception and are applied as a true minimum discount). A bureau member can avoid application of the default discount simply by offering a shipper a discount that is lower than the published minimum. Thus, the default discount would be meaningless to a shipper that is offered only a 1 or 2 percent discount. Furthermore, default discounts could be rendered ineffective by the adoption of general rate increases. Clearly, the default discount proposals of the bureaus standing alone fail to ensure that some shippers do not “slip through the cracks” and end up paying only minimally discounted class rates that remain well above prevailing market rates.

IV. THE TRUTH IN RATES REQUIREMENT WILL NOT MISLEAD SHIPPERS OR DISRUPT PRICING

The rate bureaus' central criticism of the truth-in-rates requirement is that shippers will be misled by the notice, since it does not convey complete, detailed information about how the range of discounts is applied to particular traffic under particular conditions. Such criticism misses the point of the requirement. The Board did not impose the requirement to provide shippers with a comprehensive explanation of the transportation market and the pricing options available for their particular freight. The Board imposed the requirement to accomplish the more limited objective of disclosing enough discount information for shippers to conclude that they may benefit by shopping for competitive rates.

The rate bureaus have offered nothing to dispute the utility of the truth-in-rates requirement as a means of achieving the Board's objective. Instead, they assert (i) that "[t]he discount range identified in the notice would not necessarily reflect the discounts offered by the carrier quoting the discount;" and (ii) that the discount range would not reflect "the range of competitive discounts that might be offered by carriers on an particular shipper's traffic in view of the relevant characteristics of that traffic." *See* EC-MAC Petition at 10. Even assuming such statements are true, they do not challenge whether the required disclosures adequately notify shippers that they ought to shop around for competitive rates.

Indeed, the rate bureaus' own explanation of how shippers will be "misled" simply confirms that the required disclosures will likely achieve the purpose intended by the Board — to motivate shippers to seek competitive discounts. In that regard, the rate bureaus point out that the truth-in-rates requirement would call for the disclosure of discount ranges approaching 75%. *See* EC-MAC Petition at 10. Because such substantial discounts are normally reserved for high-volume shippers like Wal-Mart, the rate bureaus contend that the required notice would

“mislead” shippers by inducing them “to seek discount levels that may be appropriate for Wal-Mart, but clearly not an occasional shipper.” *Id.* at 10 – 11. What the rate bureaus label as “misleading” simply describes the possible starting point for a rate negotiation. An occasional shipper who believes that he or she is entitled to the Wal-Mart discount may ask a carrier for a 75% discount, providing the carrier an opportunity to explain why a lesser discount is in order. If the shipper is not satisfied with the explanation, he or she may contact another carrier to negotiate an alternative rate. Such information-sharing and comparison shopping is exactly what the Board hopes to encourage. Accordingly, the rate bureaus’ argument that truth-in-rates disclosures will mislead shippers is simply not persuasive.

The rate bureaus’ stated concerns about price disruptions and discrimination are equally unavailing. On the issue of price disruptions, the rate bureaus merely suggest that the truth-in-rates requirement might prompt some rate bureau members to provide shippers direct price quotes instead of expressing their prices as percentage discounts from inflated collective rates. *See* EC-MAC Petition at 12 – 13. The rate bureaus offer absolutely nothing to back up their assertions that such behavior (i) will cause the market to “operate less efficiently” and (ii) will “make it harder for shippers to [compare rates].” *See* EC-MAC Comments at 13. On the contrary, providing direct price quotes would tend to improve the efficiency of the market and facilitate comparison shopping by eliminating the extra step of tying actual rates to inflated collective rates that do not reflect market conditions. Moreover, because various bureau members use a different baseline from which they offer discounts, rate comparisons under the rate bureau pricing schemes can be misleading to shippers (i.e. a 65% discount off of one baseline could lead to a higher bottom line charge than a 40% discount off of a different baseline).

The rate bureaus' argument that the Board is unduly interfering with the free market is equally lacking in merit. The Board has already rejected that argument on the grounds that the Board is not forcing rate bureau members to charge particular rates for their traffic. Rather, the Board is only setting conditions on the rate bureaus' eligibility for immunity from the antitrust laws that normally govern pricing activity in the free market. As the Board explained in its 2000 Decision,

First, we must emphasize that we are not meddling or intruding in private business at all. Rather, the rate bureaus themselves have filed applications asking us to immunize them from the laws that would otherwise govern private businesses operating in the free market. If the rate bureaus do not want us to 'intrude' into their affairs, they can withdraw their applications for antitrust immunity, and we will leave them to set whatever rates they want, however they want to set them, subject to whatever laws will apply to their unimmunized conduct. If they want immunity from the laws that govern private businesses in the free market, however, then they must demonstrate to us that immunity is in the public interest. And our view has been, and still is, that *carriers should not be given antitrust immunity to collectively set, and to charge, rates that are above competitive levels; rather, if carriers want to set and charge rates above competitive levels, they must do so individually and not through rate bureaus.*

See 2000 Decision at 4 (emphasis added).

The rate bureaus' stated concern about discrimination simply underscores the degree to which their collective rates have lost touch with prevailing market conditions. Whether the required truth-in-rates notice really serves as a "scarlet letter"⁷ depends, first and foremost, on how high the rate bureaus set their collective rates above the market. Because the rate bureaus control that variable, they cannot invoke it to play the discrimination card. Likewise, the rate bureaus and their members are free to decide whether the advantages of antitrust immunity outweigh the costs of providing the required notice. If they desire the same flexibility to quote prices available to non-member carriers, they can do so subject to the same antitrust laws that govern other participants in the free market. However, they cannot claim discrimination based

⁷ See EC-MAC Petition at 13.

on their voluntary decision to set collective rates with the benefit of antitrust immunity. If they desire antitrust immunity, the rate bureaus must comply with the conditions the Board deems necessary to protect the public interest.

On a final note, the Board should not alter the truth-in-rates requirement to accommodate the rate bureaus' contention that non-member carriers formulate rates based on "widely-marketed publications that reproduce rates that have been collectively made by bureau carriers." See EC-MAC Petition at 8. The rate bureaus' discrimination claims conveniently overlook the fact that the rate bureaus control the terms and conditions that govern the marketing of their own rate information. The rate bureaus could therefore solve their purported discrimination issue by imposing conditions on the use of their own information that are similar to those imposed by the Board. Alternatively, the Board could impose conditions on the marketing and distribution of the operative rate information that appropriately restrict use by non-member carriers. Moreover, individual carriers could avoid the purported discrimination by withdrawing from the rate bureaus and purchasing the referenced rate publications. In any event, the rate bureaus' claims of discrimination can be solved with measures that are less drastic than eliminating the truth-in-rates requirement.

V. THE BOARD SHOULD IMPLEMENT THE NOTICE REQUIREMENT WITHOUT THE MODIFICATIONS REQUESTED BY THE RATE BUREAUS

The Board should not alter the notice requirement to accommodate the changes requested by the rate bureaus. If adopted, the changes would substantially undercut the utility of the notice requirement as a means of protecting vulnerable shippers. The rate bureaus have essentially requested the Board to cut out the heart of the notice requirement by eliminating the range of discount disclosure and the statement that the class rate is not necessarily the market rate. See EC-MAC Petition at 15 – 17. For the reasons discussed in Section IV, *supra*, the range of

discount information does not stand to mislead shippers as the rate bureaus contend. Together, the range of discounts and the explicit disclosure that the class rate is not necessarily the market rate are well-suited to notify shippers that they ought to shop around for competitive rates. Watering down the notice would undercut that fundamental objective.

The Board should not alter the requirement to provide notice “each and every time” that a carrier lists or quotes a rate that references a collective rate. The rate bureaus offer no support for their assertion that the Board’s objectives will be met by providing notice to “new customers” in “any publication, written or electronic, that contains or references undiscounted collectively made class rates” *See* EC-MAC Petition at 17 – 18. The rate bureaus’ proposal would allow member carriers to bury the notice information in the fine print of tariff filings and other impenetrable documentation that shippers are unlikely to read, much less understand. The effectiveness of the notice requirement hinges on providing notice in a clear and conspicuous manner in connection with every pricing transaction that references a collective rate. The Board should deny the rate bureaus’ request to alter those basic requirements.

The Board should likewise deny the rate bureaus’ request to avoid submitting the “underlying data” supporting their range of discount disclosures. *See* EC-MAC Petition at 16. The underlying data is absolutely essential to verify the accuracy of the range of discount disclosures. The submission of such data would not, as the rate bureaus suggest, lead to the dissemination of “particularized information” that could be used for anti-competitive purposes. At most, the data would amount to a compilation of brief statements by member carriers identifying the highest and the lowest discounts they provided during the previous year. Neither the rate bureaus nor their members stand to be harmed by the disclosure of such limited discount information

VI. THE LOSS OF DISCOUNT REQUIREMENT IS NOT UNLAWFUL

The rate bureaus also challenge the Board's ruling preventing the application of loss of discount provisions that would reinstate a class rate as a penalty for late payment as being unlawful. The bureaus argue once again that this requirement is contrary to the motor carrier credit regulations administered by the Department of Transportation ("DOT") which authorize loss of discounts (49 C.F.R. § 377.203(g)(1)(ii)), and is contrary to the rate bureau members' right to independent action provided under 49 U.S.C. § 13703(a)(4). The Board already rejected these arguments in the 2001 Decision and must do so again.

The loss of discount ruling is clearly lawful because it is derived from the Board's broad authority over motor carrier collective ratemaking activities undertaken with antitrust immunity. The ruling represents a reasonable condition for approval of the rate bureau agreements that is necessary to protect the public interest. The Board's ruling ensures that discounts of 50, 60, or even 70 percent are not lost, and an unreasonably high class rate is not imposed as a penalty, as a result of a shipper paying its bill as little as one day late. The Board's ruling does not deny a bureau member the ability to collect reasonable costs associated with an overdue payment. It merely prevents the bureau member from collecting a windfall by imposing a penalty established under antitrust immunity that is many times higher than the actual rate agreed upon for the transportation service.

In addition, the rate bureaus falsely claim that the Board's loss of discount ruling impedes the bureau members' right to independent action. As the Board soundly pointed out in its decision, "[w]e are not here precluding carriers from using loss-of-discount provisions — only those tied to class rates that are collectively set pursuant to an agreement that we approve." 2001 Decision at 11. Under the Board's decision, the rate bureau members are free to establish appropriate loss of discount provisions that, consistent with the DOT credit regulations, result in

reasonable charges for late payment. Accordingly, the Board's ruling serves to ensure only that unreasonably high class rates are not applied as a result of late payment.

Although the bureaus claim that the loss of discount ruling is unnecessary since shippers can adjudicate the reasonableness of the penalty imposed for late payment, such adjudications are expensive and time consuming. Shippers with fewer resources who are most likely to bear the brunt of unreasonable penalties for late payment may be unaware of such rights or unable to avail themselves of costly court adjudications. The Board's loss of discount ruling provides the appropriate protection needed to such shippers and allows both carriers and shippers to avoid unnecessary costs.

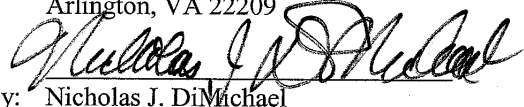
VII. CONCLUSION

For the foregoing reasons, the Board should deny the rate bureaus' Petitions for Reconsideration, and grant the Petition for Reconsideration filed by NASSTRAC.

Dated: January 22, 2002

Respectfully submitted,

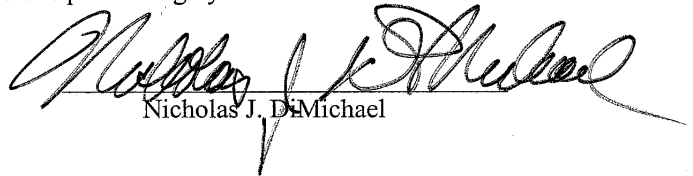
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CERTIFICATE OF SERVICE

I hereby certify that I have on this 22nd day of January 2002 served a copy of the foregoing Reply of the National Industrial Transportation League to the Rate Bureau's Petitions for Reconsideration upon all parties of record in this proceeding by first class mail.



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